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No. 92-1728

In The

# Supreme Court of the United States

October Term, 1992

JAMES L. TAYLOR, *et al.*,

*Petitioners,*

*vs.*

LIBERTY NATIONAL LIFE INSURANCE COMPANY, *et al.*,

*Respondents.*

*On Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit*

## BRIEF IN OPPOSITION FOR RESPONDENT LIBERTY NATIONAL LIFE INSURANCE COMPANY

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## QUESTIONS PRESENTED

I. Whether absent class members are bound by a final judgment providing solely equitable relief when ninety percent of the class members received actual notice, the claims of each class member were identical, and the class was adequately represented.

II. Whether each class member must be given the opportunity to opt out of a Rule 23(b)(2) class action when the claims of the class members are extremely cohesive.

## LIST OF PARTIES

The Petitioners before this Court, James L. Taylor, individually and as the administrator of the estates of James J. Taylor and Laura F. Taylor, deceased; Frances Taylor Spence, Deborah Taylor, Diane Taylor Stafford, Phillip Taylor, Gretta Taylor and Annie J. Elrod, individually and as executrix of the estate of David A. Elrod, deceased, were the appellants in the court of appeals and the movants/intervenors in the district court.

The Respondents, Liberty National Life Insurance Company, Aubrey Carr and Carr Service Enterprises, Inc., were the appellees in the court of appeals and the defendants in the district court.

The following is a listing of the parent companies and all non-wholly owned subsidiaries of respondent Liberty National Life Insurance Company:

Torchmark Development Corporation (parent),

United Investor's Management Co. (non-wholly owned subsidiary).

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## BRIEF IN OPPOSITION FOR RESPONDENT LIBERTY NATIONAL LIFE INSURANCE COMPANY

Respondent Liberty National Life Insurance Company ("Liberty National") submits this brief in opposition to the Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit filed in the above-styled case. As shown herein, the petition should be denied.

## STATEMENT OF THE CASE

This case arises out of a dispute over the benefits afforded under burial insurance policies sold by Liberty National to residents of Alabama beginning in the 1920's. In 1970, several funeral directors in Alabama filed a class action suit against Liberty National in the United States District Court for the Northern District of Alabama. *Battle v. Liberty Nat'l Life Ins. Co.*, CV-70-H-752-S. In 1972, another class action was filed against Liberty National on behalf of all Alabama burial insurance policyholders of Liberty National. *Campbell v. Liberty Nat'l Life Ins. Co.*, CV-72-H-569-S. These class action lawsuits arose out of a dispute, *inter alia*, as to what benefits a policyholder was entitled to in the event a policyholder's beneficiary rejected the funeral provided by the policy and instead purchased more expensive merchandise or services than those provided for in the burial policy. This situation is referred to as an "oversale."

The relief sought by the policyholder class included a ruling that, in the event of an oversale, Liberty National had to provide a credit for the full retail value of the funeral as stated in the policies. In 1977, the parties agreed to enter into a settlement agreement of the funeral director and policyholder class claims. The settlement agreement contemplated that if the District Court approved the agreement, the court would enter a final judgment clarifying or reforming the liabilities of Liberty National under the burial policies and the corresponding rights of the policyholders and the obligations of authorized funeral directors in the event of an oversale, in accordance with the relief sought by the policyholder class. For example, under the settlement agreement, the final judgment would require that, in the event of an oversale, the policyholder, or the beneficiary, would be entitled to a credit in an amount equal to the full retail value stated in the policy, just as requested by the policyholder class.

The cases were consolidated under the *Battle* heading, and the District Court determined that the policyholder class met the requirements of Federal Rule of Civil Procedure 23(b)(2). The District Court approved a five-page notice of the settlement, which was distributed by Liberty National agents to policyholders who were still paying premiums on their burial policies, and the settlement received media attention. The notice summarized the nature and history of the litigation, informed policyholders that the parties had agreed to a settlement, described its major provisions, and informed class members that they could file written objections to the settlement with the District Court and orally offer comments on the agreement at a fairness hearing, the time and place for which were specified in the notice.

The District Court expressly found that notice had been provided to approximately 90% of the policyholder class. The District Court received and considered objections to the settlement by over 1,400 policyholders both before and after the December 1977 fairness hearing. On January 6, 1978, the District Court entered a final judgment in *Battle*, approving the settlement agreement. The judgment provided that, in the event of an oversale, the policyholder, or the beneficiary, would be entitled to a credit equal to the retail value stated in the policy. No money damages were awarded. Only living policyholders were affected by the decree, and because all of these policyholders were living, none of them had or could have had any monetary claims for breach of the burial insurance policies at that time. The District Court also expressly retained jurisdiction over the subject matter and all parties to the proceedings.

James J. Taylor, Laura F. Taylor, and David Elrod were living Liberty National burial policyholders in 1977, at the time the claims of the policyholder class were settled and when the final judgment was entered. Following the deaths of Mr. and Mrs. Taylor and Mr. Elrod, the Taylors' children and Mr. Elrod's widow,

the Petitioners before this Court, rejected the funeral service provided by the policy and instead purchased more expensive merchandise than was provided for under the burial policies. Each rejection of the policy funeral and corresponding purchase of funeral services and merchandise not provided by the policy created an oversale. Pursuant to the terms of the *Battle* final judgment entered in 1978, the funeral directors gave a credit against the funeral bill equal to the stated retail value of the policy involved. Petitioners do not dispute that the Taylor and Elrod policies were administered in a manner consistent with the terms of the 1978 final judgment. Petitioners contend instead that they are not bound by the terms of the 1978 final judgment because they did not receive actual, individual notice of the settlement and were not given the opportunity to opt out of the case. According to Petitioners, when Liberty National complied with the federal district court's final decree, it breached its contractual obligations.

In 1983 and 1984, the Taylors' estate and children and Mr. Elrod's estate and widow brought suit against Liberty National in an Alabama circuit court. Liberty National asserted the preclusory effect of the *Battle* final judgment as a defense to these suits, and the circuit court granted summary judgment in favor of Liberty National on the basis of the *Battle* final judgment. The Taylors appealed, and the Alabama Supreme Court, in a 4 to 2 decision, reversed the state circuit court's summary judgment ruling and remanded the case for further proceedings. *Taylor v. Liberty Nat'l Life Ins. Co.*, 462 So. 2d 907 (Ala. 1984). The Alabama Supreme Court's decision, however, was not a final judgment that would be entitled to any preclusive effect as it only reversed the trial court's ruling on the motion for summary judgment. *Battle v. Liberty Nat'l Life Ins. Co.*, 877 F.2d 877, 882 (11th Cir. 1989).

Following the *Taylor* decision, Liberty National petitioned the District Court in *Battle*, which had retained jurisdiction over the case, to enjoin the prosecution of the state court actions. In March

1985, the District Court entered a preliminary injunction barring the Taylors from further prosecuting their two lawsuits against Liberty National in state court. In May 1987, the District Court rendered the injunction permanent.[1] *Battle v. Liberty Nat'l Life Ins. Co.*, 660 F. Supp. 1449 (N.D. Ala. 1987). In July 1989, the United States Court of Appeals for the Eleventh Circuit affirmed the District Court's action. *Battle v. Liberty Nat'l Life Ins. Co.*, 877 F.2d 877 (11th Cir. 1989).

In February 1990, the Petitioners intervened in *Battle*, and filed a motion for relief from the *Battle* final judgment pursuant to Rule 60(b)(4). On August 6, 1991, the District Court denied the Rule 60(b)(4) motion. *Battle v. Liberty Nat'l Life Ins. Co.*, 770 F. Supp. 1499 (N.D. Ala. 1991). Once again, on October 14, 1992, the United States Court of Appeals for the Eleventh Circuit affirmed the decision of the District Court. *Battle v. Liberty Nat'l Life Ins. Co.*, 974 F.2d 1279 (11th Cir. 1992) (per curiam). Petitioners then filed a petition for rehearing and suggestion of rehearing *en banc* on November 3, 1992, which was denied on January 26, 1993.

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1. The *Elrod* case was removed to federal court, and further prosecution of the case was enjoined by the district court in its permanent injunction order.

## REASONS FOR DENYING THE WRIT

### I.

### THE ELEVENTH CIRCUIT'S DECISION REGARDING INDIVIDUAL NOTICE DOES NOT CONFLICT WITH THE OPINION OF ANY OTHER CIRCUIT COURT OF APPEALS OR WITH ANY APPLICABLE DECISIONS OF THIS COURT.

The essence of Petitioners' argument, which has been repeatedly rejected throughout this case, is that due process requires that all absent class members receive actual, individual notice and the right to opt out in *every* class action. In the absence of such individualized notice with opt out rights, Petitioners contend absent class members will not be bound by any judgments entered in the class action, regardless of the nature of the relief sought, the similarity of the class members and their claims, or the adequacy of class representation. Such a broad and sweeping view of class action notice requirements, however, has never been expressed or intimated by this Court or any circuit court of appeals, and is not required by due process.

In addition, Petitioners obscure the fact that they did not have the monetary claims they now seek to assert at the time the final judgment was entered, and that their present claims arose solely because Liberty National complied with the District Court's final decree. Petitioners argue that their present claims for monetary damages, which arose many years after the claims of the policyholder class were settled, cannot be barred because they did not receive notice in 1977 of the settlement in *Battle*. It is important to understand that Petitioners' claims for monetary damages did *not* exist in 1978 at the time of the final judgment, which completely undermines Petitioners' argument. As living policyholders or the beneficiaries of such policyholders,

Petitioners did not and could not have had any claims for monetary damages in 1978. The alleged "monetary" claims they seek to assert today arose as a direct result of Liberty National's compliance with the final judgment in the 1980's, and such claims, therefore, have no bearing on the type of notice required in 1978.

Petitioners' contention that the Eleventh Circuit's and the District Court's decisions in this case are in conflict with this Court's decisions in *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950) and *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797 (1985), is incorrect.[2] Neither of those cases requires that actual, individual notice, including opt out rights, be provided to every absent class member in a Rule 23(b)(2) class action where the interests of the class members are virtually identical. In *Mullane* and *Shutts*, the plaintiffs sought *exclusively* monetary relief, unlike the policyholder class in the instant case, which sought (and received) equitable relief in the form of reformation of the policies. Indeed, the *Shutts* Court went so far as to expressly limit its holding to "class actions which seek to bind known plaintiffs concerning claims *wholly or predominantly for money judgments*." *Shutts*, 472 U.S. at 811 n. 3 (emphasis added). The *Shutts* Court expressly declined to offer any view concerning class actions such as the instant case where the class seeks injunctive and declaratory relief. *Id.* Because the monetary claims Petitioners now seek to assert did not exist at the time of the entry of the final judgment, and only arose years after the final judgment because Liberty National complied with that judgment, *Shutts* is not relevant to this case.

As noted above, the *Shutts* decision expressly states that it

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2. Petitioners do not contend that the Eleventh Circuit's decision is in conflict with the decisions of any other circuit courts of appeal. Indeed, such a contention could not be made as there are no decisions from any circuit or this Court that impose class action notice requirements such as those urged by Petitioners in this case.

does not apply to Rule 23(b)(2) actions that do not involve monetary claims such as this case. Even if it is assumed, however, that the Petitioners possessed monetary claims at the time of the final judgment, the mere presence of such claims is not determinative regarding the need for individual notice, and *Shutts* does not hold otherwise. Applying such a distinction mechanically would elevate form over substance. The approach uniformly employed by this Court and the circuit courts of appeals is to examine the *cohesiveness* of the class and their claims to determine the need for individual notice. *Mullane*, 339 U.S. at 319 (where interests are cohesive, only "notice reasonably certain to reach most of those interested" is required); *Holmes v. Continental Can Co.*, 706 F.2d 1144, 1155 n. 8 (11th Cir. 1983); *Wetzel v. Liberty Mutual Ins. Co.*, 508 F.2d 239, 248 (3rd Cir.), *cert. denied*, 421 U.S. 1011 (1975). Further, the Advisory Committee Notes to the 1966 Amendment to Rule 23 state "[i]n the degree that there is cohesiveness or unity in the class and the representation is effective, the need for notice to the class will tend toward a minimum."

Although the policyholder class was extraordinarily large, the class also was extraordinarily homogenous and cohesive. The claims of each class member were identical because they arose from policies that were identical, or virtually so, on all key provisions. None of the policyholders' claims was special or unique, no conflicting or divergent interests existed within the class, and the adequacy of representation presented by the named plaintiffs and their counsel is not in question. Petitioners do not make any argument to the contrary. Accordingly, in this Rule 23 (b)(2) class action, individual notice was not procedurally or constitutionally required because of the cohesiveness of the class members' interests. *Mullane*, 339 U.S. at 319.

Petitioners' reliance on *Mullane* is incorrect because, as noted above, the legal principles set forth in *Mullane* support the

Eleventh Circuit's decision regarding the importance of cohesive interests. Moreover, the requirement of notice in *Mullane* was based upon circumstances very different from the present case, including lack of cohesiveness. Monetary damages were the exclusive relief sought in *Mullane*, and it was *not* a Rule 23 class action. The interests of the plaintiffs in *Mullane* were divergent and potentially conflicting. The plaintiffs all had claims against a limited trust fund and could not be adequately represented by the named plaintiffs. *Mullane*, 339 U.S. at 316. A gain by any particular plaintiff could only result in a corresponding loss to another plaintiff. A "zero sum" situation such as that presented in *Mullane* is not present in this case. Thus, contrary to Petitioners' argument, the decision in *Mullane* to require greater notice was based upon a lack of cohesiveness and the presence of divergent interests among the claimants to the limited fund. Such an analysis is completely consistent with the Eleventh Circuit's decision in this case.

The distinction between the facts of *Mullane* and a class action involving a cohesive class has been observed by other courts. For example, the Third Circuit in *Wetzel* noted that the situation in *Mullane* was very different from that presented in cases that involve a Rule 23 (b)(2) class action, such as *Battle*. Under the facts of *Mullane*, the *Wetzel* court pointed out that:

> the possibility that parties having conflicting interests in specific property could be bound by an action of which they had no actual notice and brought by parties who possibly represented those interests inadequately does violate due process. This possibility could not occur in a (b)(2) action.

*Wetzel*, 508 F.2d at 256.

There is no dispute in this case that the policyholder class was properly certified as a Rule 23(b)(2) class action. Thus, it is clear that *Mullane* does not control the type of notice to be given to the highly cohesive policyholder class in this case where the interests of the named policyholders were not in conflict with other class members and representation was adequate. Contrary to Petitioners' argument, *Mullane* does not require actual, individual notice in every class action and is not inconsistent with the Eleventh Circuit's decision in this case. *See also Bolton v. Murray Envelope Corp.*, 553 F.2d 881, 883 (5th Cir. 1977); *Robinson v. Union Carbide Corp.*, 544 F.2d 1258, 1260 (5th Cir.), *cert. denied*, 434 U.S. 822 (1977).

The Alabama Supreme Court's decision in *Taylor* likewise does not present a conflict with the Eleventh Circuit's opinion. The *Taylor* decision was predicated wholly upon an assumption, for purposes of determining whether summary judgment was proper, that the policyholder class should have been certified as a Rule 23(b)(3) class rather than a Rule 23(b)(2) class. That issue was not before the Eleventh Circuit in the decision challenged by the Petitioners and is not presently before this Court. Moreover, the *Taylor* court agreed completely that in a Rule 23(b)(2) class action, due process does not require that absent class members receive actual, individual notice with opt out rights. *Taylor*, 462 So. 2d at 911 (stating that "if the federal court's 23(b)(2) certification of the policyholder class was correct, the instant insureds were not entitled to notice."). Finally, as noted earlier, *Taylor* was not a final judgment that would be accorded preclusive effect in any state or federal court. *Battle v. Liberty Nat'l Life Ins. Co.*, 877 F.2d 877, 882 (11th Cir. 1989). Thus, *Taylor* does not present a conflict appropriate for resolution by this Court.

## II.

## THIS COURT'S DECISION IN *SHUTTS* DOES NOT REQUIRE THE INCLUSION OF OPT OUT RIGHTS IN EVERY CLASS ACTION.

Petitioners contend that they are not bound by the 1978 final judgment because they, like all the other policyholders, were not given the opportunity to opt out of the case. Petitioners, however, were members of an extremely cohesive Rule 23(b)(2) class seeking predominantly equitable relief. The law is clear that in such class actions due process does not require that class members have the absolute right to opt out. *Holmes*, 706 F.2d at 1153; *Penson v. Terminal Transport Co.*, 634 F.2d 989, 993 (5th Cir. 1981). The language of Rule 23 regarding notice requirements for a (b)(2) class is straight-forward and uncomplicated. Because notice to Rule 23(b)(2) classes is discretionary, even Rule 23(b)(2) class members who have monetary claims do not have automatic opt-out rights under either Rule 23 or the due process clause. If the class members' claims are homogenous and not uniquely individual to each class member, there is no need to provide the opportunity to opt out. Where the claims of the class are not in conflict because of individualized questions of law or fact, then as long as the class is adequately represented, due process does not require that each class member be given the opportunity to pursue a separate action.

In this case, the requested relief applied to each class member in precisely the same manner, which eliminated the need for an absent class member to have the opportunity to opt out. There has been no contention that the policyholders' claims, as they existed in 1978, were not cohesive, that is, in any way different or individualized from the claims asserted by the policyholder class over fifteen years ago. Petitioners do not claim that individual notice with opt out rights was required in this case because of

divergent interests among the members of the policyholder class. Rather, Petitioners claim, without authority, that due process requires such notice in all class actions.

The *Shutts* decision does not support Petitioners' argument that the absence of an opportunity for members of the policyholder class to opt out of this (b)(2) class action violates due process. The *Shutts* Court in no way held or inferred that due process requires the inclusion of individual notice and opt-out rights as indispensable elements of every class action. The *Shutts* Court went so far as to *expressly limit* its holding to "class actions which seek to bind known plaintiffs concerning claims *wholly or predominately for money judgments*." *Shutts*, 472 U.S. at 811 n.3 (emphasis added). The *Shutts* decision has never been interpreted as requiring actual notice or opt-out rights in 23(b)(2) class actions involving a cohesive class seeking predominantly equitable relief. *See* 1 H. Newberg, *Newberg On Class Actions*, §1.15 at 11, 13 (Supp. 1992) (*Shutts* did not change no-opt-out rule in 23(b)(2) actions).

The unique aspect of *Shutts* was that the overwhelming majority of the class plaintiffs in the case had no connection with the forum state, Kansas. The principal analysis of the case centered on whether a class *plaintiff* with wholly monetary claims who resided outside the forum state must have the same type of "minimum contacts" with the forum that an out-of-state *defendant* must have before the forum state may constitutionally exercise personal jurisdiction over the party. *Shutts*, 472 U.S. at 808. The issue in the instant case is whether actual notice to over ninety percent of a homogeneous class of exclusively *in-state* plaintiffs seeking injunctive and declaratory relief satisfies due process. The *Shutts* decision, therefore, does not require a different result in the present case.

Consistent with due process, individual notice with opt-out

rights was not required for the policyholder class in the present case. Petitioners had no monetary claims at the time the final judgment was entered in 1978, and equitable relief was sought primarily. Moreover, Petitioners' claims were in no way unique from the claims of any of the other policyholders, and the adequacy of the representation of the class is beyond question. Accordingly, the Eleventh Circuit and the District Court properly held that a due process violation was not presented under these facts. This decision clearly comports with the principles set forth in this Court's applicable decisions and the opinions of all the circuits that have considered these issues.

## CONCLUSION

There are no special or important reasons for granting the petition in this case. The Eleventh Circuit has not rendered a decision that conflicts with the decision of another United States Court of Appeals or that conflicts with applicable decisions of this Court. As correctly held by the Eleventh Circuit and the District Court, the Petitioners were not denied due process in the adoption of the 1977 settlement agreement. For over fifteen years, Liberty National and its burial policyholders have relied upon and been guided by the terms of the *Battle* final judgment, which was brought about after nearly eight years of litigation. Accordingly, Respondent Liberty National Life Insurance Company respectfully requests that the Court deny the Petition for a Writ of Certiorari in this case.

Respectfully submitted,

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